COA No. 46771-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

NATHANIEL WILSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF THURSTON COUNTY

The Honorable Anne Hirsch

APPELLANT'S OPENING BRIEF

OLIVER R. DAVIS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ASSIGNMENTS OF ERROR

1. In Mr. Wilson's trial on burglary charges, the trial court erred in denying his CrR 3.6 motion to suppress evidence.

2. The trial court erred in entering CrR 3.6 finding of fact 8, stating that the defendant was free to leave the scene when Officer Jordan was speaking with him.

3. The trial court erred in entering CrR 3.6 conclusion of law 3 that the encounter between Officer Jordan and Mr. Wilson was a social contact.

4. The trial court erred in refusing to give Mr. Wilson's proposed defense jury instruction.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the court err in denying Mr. Wilson's CrR 3.6 motion to suppress evidence in the form of photomontage identifications and in-court identifications, as the fruit of the poisonous tree of an illegal Terry stop of Mr. Wilson, where Nathaniel Wilson was not free to leave the scene?

2. Did the trial court abuse its discretion in refusing to give Mr. Wilson's proposed defense jury instruction stating that the jury should be careful when assessing the reliability of eyewitness identifications, where the court committed legal error, and failed to

exercise its discretion, by categorically rejecting the instruction as a comment on the evidence?

C. STATEMENT OF THE CASE

Nathaniel Wilson was charged with residential burglary allegedly committed on February 3, 2014, attempted residential burglary committed on February 19, and residential burglary on March 4, 2014. CP 6, 7.

According to the State's allegations and witnesses, an Olympia resident, Sarah Roney, reported to police that she had returned home on February 3, and discovered a male and a female in her house, who exited and then said they were looking for their dog. After the two persons walked or ran away, Roney noticed property missing from the home, including a Sony Handycam. CP 4 (affidavit of probable cause for original information charging count 1); 9/16/14RP at 26-29.

On March 4, Olympia police officer Jeff Jordan investigated an apparent burglary at the home of Marla Kentfield in Olympia; a rock had been thrown through the french doors and the homeowner reported that property was taken, including a camera and a cell phone. No fingerprints were found. 9/16/14RP at 41-44. Ms. Kentfield testified that property including costume jewelry and a

Kindle Fire had been taken from her home. 9/16/14RP at 92-93 (this allegation formed the basis of count 3, on which Mr. Wilson was acquitted).

Later on the same date of March 4, Officer Jordan observed a male, determined to be Mr. Wilson, and a female walking near Garfield Avenue in Olympia; after contacting them and running the defendant's name, Mr. Wilson was arrested on an outstanding warrant. 9/16/14RP at 47-49. State's exhibit 1 was identified as the Department of Licensing record of Hailey Legendre, the female that Mr. Wilson was walking with. 9/16/14RP at 47-48; State's exhibit 1.

Police at the scene, including Sergeant Matt Renschler, subsequently came to the belief that Wilson matched the description given by Ms. Roney, the burglary complainant from early February. 9/16/14RP at 49. Renschler went and showed Ms. Roney a photomontage he created, that included Mr. Wilson; Roney stated that Wilson was the male who had been inside her house. CP 4-5; Supp. CP ___, Sub # 41 (State's trial memorandum, at p. 2). The police had showed Ms. Roney several photomontages in the weeks before this. 9/16/14RP at 88-89.

Roney testified she initialed one of the pictures in the montage Sergeant Renschler showed her, because she "gave this guy a positive 100 percent ID when I saw it." 9/16/14RP at 30-31; State's Exhibit 2. Roney then stated that she saw "that guy" in the courtroom, naming the defendant at defense counsel table. 9/16/14RP at 31. For emphasis before the jury, the prosecutor elicited in re-direct examination that Ms. Roney was "a hundred percent sure" that the person she picked in the photomontage was the burglar. 9/16/14RP at 39.

Jerry Kim Hines was an elderly lady who had been allowing Mr. Wilson and his girlfriend Hailey Legendre to reside in a room at her Olympia home, because Nathaniel had been kicked out of his family's house. Ms. Hines stated that she began to notice that tape and string was run in front of the door to the bedroom she was allowing the couple to use. 9/16/14RP at 52-54. Then, on March 5, Hines arrived home to find police inside her house, and a variety of electronics items that she did not recognize were laid out in her living room. 9/16/14RP at 57-59.

Sergeant Renschler had obtained the search warrant for the Hines home after police surveilled Hailey Legendre for some weeks following Mr. Wilson 's arrest. 9/16/14RP at 71-72. The police

searched the Hines apartment for items from several burglaries, and a Sony Handycam, a Kindle tablet, and some costume jewelry were located in the apartment. 9/16/14RP at 76-78; 9/17/14RP at 110-113 (testimony of Officer Shawn Lindros).

The count of attempted burglary was charged based on the report of Ms. Constance Cameron, who testified that she awoke in her home on February 19 to hear knocking on her door. She saw a male and female through the peephole. 9/17/14RP at 116. Ms. Cameron did not know these people, so she went back to bed, but several minutes later she heard the door swing open. A male shouted "Steven," and Ms. Cameron yelled "No" as she ran to the back of the house. 9/17/14RP at 119. She later saw people far down the street, so she got in her car and caught up with them, and stated they were the people she had seen through the peephole. 9/17/14RP at 122. The two said they had been looking for their dog but denied they were at Ms. Cameron's house. Cameron was later shown the same photomontage by one Officer Eric Henrichsen, and she stated that the picture of Mr. Wilson was the male. 9/17/14RP at 124. She also said that the defendant in court was the male. 9/17/14RP at 125.

Following the jury trial, Mr. Wilson was acquitted on count 3, and was subsequently sentenced on counts 1 and 2 to concurrent standard range terms of 67.5 and 52.5 months. CP 46-48, 56-72.

Mr. Wilson appeals. CP 63.

D. ARGUMENT

1. THE PHOTOMONTAGE IDENTIFICATIONS AND SUBSEQUENT IN-COURT IDENTIFICATIONS MADE BY THE BURGLARY COMPLAINANT WERE THE FRUIT OF AN ILLEGAL SEIZURE.

Prior to trial, Mr. Wilson moved by CrR 3.6 motion to suppress the fruits of his arrest, specifically the photomontage identifications, and the complainant's subsequent in-court identifications. CP 8-10, 11-19, 20-21, 22-25. The prosecutor argued that Mr. Wilson was not "seized" when Officer Jordan ran his name for warrants, and the court agreed, and denied Mr. Wilson's CrR 3.6 motion. CP 8-10, 11-19, 26-29 (State's memorandum in opposition to motion to suppress); CP 75-77 (Findings of fact and conclusions of law) .

a. Mr. Wilson was detained when Officer Jordan ran his name for warrants and controlled his conduct while the officer questioned his girlfriend, requiring the officer to have "reasonable suspicion." The Fourth Amendment to the United

States Constitution and article I, section 7 of the Washington Constitution prohibit unreasonable searches and seizures. Terry v. Ohio, 392 U.S. 1, 16-19, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); State v. Parker, 139 Wn.2d 486, 527, 987 P.2d 73 (1999). Warrantless seizures of a person by law enforcement are per se unreasonable and violate these constitutional protections. State v. Ladson, 138 Wn.2d 343, 350-51, 979 P.2d 833 (1999).

A seizure of a person occurs if, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." State v. Aranguren, 42 Wn. App. 452, 455, 711 P.2d 1096 (1985) (citing United States v. Mendenhall, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980)).

The Washington Supreme Court has said that a seizure occurs under article I, section 7 when, considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave, or decline a request, due to an officer's display of authority, a determination that is made by objectively looking at the actions of the law enforcement officer. State v. Young, 135 Wn.2d 498, 501, 957 P.2d 681 (1998). If a person as a result of those

circumstances reasonably would feel he is being required by the officer to remain where he is, he has been seized. State v. Friederick, 34 Wn. App. 537, 541, 663 P.2d 122 (1983).[1]

Here, according to the trial court's resolution of disputed facts after a CrR 3.6 hearing at which Mr. Wilson testified, Officer Jordan stopped Mr. Wilson's girlfriend, Ms. Hailey Legendre, after she was observed walking across Garfield Avenue and potentially impeding vehicle travel in violation of the Olympia Municipal Code, 9.16.180(A)(1). CP 75-77 (Findings 5, 6, 7, 8). When the deputy exited his vehicle and began talking to Ms. Legendre, Mr. Wilson, who had been accompanying her, joined the conversation. Officer Jordan told Mr. Wilson that he could not smoke a cigarette. Around the same time that Sergeant Renschler arrived on the scene, Officer Jordan then requested Mr. Wilson's name, and he ran the name through his personal radio to dispatch, discovering an arrest warrant. CP 76-77 (Findings 9, 10, 11, 12, 13).[2]

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[1] The question whether a seizure has occurred during a citizen-police encounter is a mixed question of law and fact. State v. Rankin, 108 Wn. App. 948, 954, 33 P.3d 1090 (2001), reversed on other grounds, 151 Wn.2d 689, 92 P.3d 202 (2004). On review of a suppression motion, the Washington appellate courts defer to the trial court's non-erroneous factual findings, but the issue whether the supported facts amount to a "seizure" of the defendant by the police is a question of law, which is examined de novo. State v. Thorn, 129 Wn.2d 347, 351, 917 P.2d 108 (1996).

[2] The trial court did not credit Mr. Wilson's CrR 3.6 hearing testimony that he was told to sit on the bumper of Officer Jordan's police car while the officer

This was a seizure of Mr. Wilson. Looking solely to the facts found by the trial court, a reasonable person in his position, as a result of the officer's conduct and restrictions on Mr. Wilson's behavior, would not feel free to walk away, even during the earlier junctures in the encounter. Checking a person's name and driver's license to see if the license is valid is an investigative detention. State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004). Under the Supreme Court's Rankin case law and its progeny, the detention in these circumstances arises not by any physical handing-over of a license card to an officer; rather, here it was Officer Jordan's request that Mr. Wilson identify himself by name, and the officer's running of Wilson's information through a dispatch check, that created a seizure. State v. Brown, 154 Wn.2d 787, 788-89, 796-98 and n. 7, 117 P.3d 336 (2005). During that time Mr. Wilson would certainly not feel free to leave the scene while the officer was performing an apparent duty. See State v. Ellwood, 52 Wn. App. 70, 73, 757 P.2d 547 (1988) (telling citizen to wait is a seizure). The arrival of Sergeant Renschler during that same time also contributed to a seizure. State v. Young, 135 Wn.2d at 512

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spoke with him and Ms. Legendre, and did not credit his testimony that Officer Jordan ordered him to hand over his identification card and walked back to his patrol car to run it for warrants. CP 75-77 (Finding 9); 8/25/14RP at 27-30.

(arrival and interaction by additional officers may ripen social contact into detention).

This was not a social contact. Cf. State v. Harrington, 167 Wn.2d 656, 664-65, 222 P.3d 92 (2009) (officer's act of conversing with pedestrian did not ripen into detention); State v. Belanger, 36 Wn. App. 818, 820, 677 P.2d 781 (1984) (approaching pedestrian and conversing in the public square was not detention).

Here, under all the circumstances, Mr. Wilson would feel that he could not walk away. A Fourth Amendment seizure was effected, and reasonable suspicion of unlawful activity was required. U.S. Const. amend. 4.

b. There was no reasonable suspicion. Mr. Wilson was detained, and that detention was required to be supported by reasonable suspicion. State v. Hudson, 124 Wn.2d 107, 112, 874 P.2d 160 (1994) (citing State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986)); U.S. Const. amend. 4; Wash. Const. art. 1, § 7. This means "a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." State v. Larson, 93 Wn.2d 638, 644, 611 P.2d 771 (1980) (citing Brown v. Texas, 443 U.S. 47, 51, 99 S.Ct. 2637, 2641, 61 L.Ed.2d 357 (1979)); see also Kennedy, 107 Wn.2d at 5. Under the Fourth Amendment and

Article I, § 7, the facts relied on by the detaining officer must be objective, meaning "specific and articulable," rather than premised on a hunch. Terry v. Ohio, 392 U.S. at 21; State v. Armenta, 134 Wn.2d 1, 20, 948 P.2d 1280 (1997).

Here, Mr. Wilson's detention was plainly illegal under the foregoing standards. Past information about a suspect may be pertinent to corroborate suspicions of specified current activity, and establish reasonable suspicion. See, e.g., United States v. Lalor, 996 F.2d 1578, 1581 (4th Cir. 1993) (suspect's cocaine arrest five days earlier corroborated claims of informants of alleged continued trafficking activity).

However, here, at the time of the stop, there was no belief on the police officer's part that Mr. Wilson had been involved in any past or present criminal conduct at all. He was simply walking along the side of the road, which is not criminal. See State v. Duncan, 146 Wn.2d 166, 179, 43 P.3d 513 (2002); Kennedy, 107 Wn.2d at 6.

Further, at no point did Mr. Wilson's conduct create reasonable suspicion after the initial contact. State v. Veltri, 136 Wn. App. 818, 821-22, 150 P.3d 1178 (2007) (continuance of police contact improper absent reasonable suspicion). The totality

of facts in this case did not create any reasonable articulable suspicion of current criminal activity. State v. Glover, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). The detention of Mr. Wilson was unlawful.

c. Reversal is required under the "fruit of the poisonous tree" doctrine. Subsequent to Mr. Wilson's arrest, and as a result of it, several Olympia police officers determined that Mr. Wilson resembled a suspect in several burglaries, and photomontages that included his face were shown to the complainants, resulting in the burglary charges. CP 76-77 (Findings 16, 17); 9/16/14RP at 30-31, 47-49; 9/17/14RP at 124-25.

The foregoing evidence, which defense counsel sought to be excluded, was improperly admitted. Evidence will be excluded as fruit of an illegal seizure unless the illegality is not the "but for" cause of the discovery of the evidence, and suppression is required where the challenged evidence is in some sense the product of illegal governmental activity. Segura v. United States, 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 599, 615 (1984).

Here, the photomontage identifications of Mr. Wilson by Ms. Roney (count 1) and by Ms. Kentfield (count 2), and the identifications of the defendant that these witnesses subsequently

made in court, was evidence that was obtained as a product of Officer Jordan's arrest of the defendant on March 4, 2014. 9/16/14RP at 30-31, 47-49; 9/17/14RP at 124-25; CP 75-77 (CrR 3.6 findings of fact).

This evidence was central, and necessary, to Nathaniel Wilson's convictions on counts 1 and 2. Admission of the illegally obtained evidence at trial in this burglary prosecution was constitutional error, and not harmless beyond a reasonable doubt, requiring reversal of both counts. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); State v. Smith, 165 Wn. App. 296, 316, 266 P.3d 250 (2011) (citing State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985)).

2. THE COURT ERRONEOUSLY DENIED THE DEFENSE JURY INSTRUCTION ON EYEWITNESS IDENTIFICATION.

The defense requested but was denied a proposed jury instruction telling the jury to be careful in assessing the witnesses' photomontage and in-court identifications, with the trial court stating twice that this would be a "comment on the evidence" and the jury was being told that it was the sole judge of credibility. 9/17/14RP at 145-48.

a. The trial court erroneously deemed the proposed instruction *per se* improper based on it being a comment on the evidence and credibility, where our Supreme Court has stated that these concerns are not bars to such an instruction.

The jury instructions in a criminal case must properly inform the jury of the applicable law, may not be misleading, and must permit each defendant to argue its theory of the case. State v. Embry, 171 Wn. App. 714, 756, 287 P.3d 648, 669 (2012) (citing State v. Tili, 139 Wn.2d 107, 126, 985 P.2d 365 (1999)).

In this case, the trial court erred by categorically rejecting the defense instruction,[3] and by not exercising its discretion. Because eyewitness identification was a central issue in the case, Mr. Wilson proposed the following jury instruction:

> Although nothing may appear more convincing than a witness's categorical identification of a perpetrator, you must critically analyze such testimony. Such identifications, even if made in good faith, may be mistaken. Therefore, when analyzing such testimony, be advised that a witness's level of confidence, standing alone, may not be an indication of the reliability of the identification.

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[3] On appeal, this Court reviews the adequacy of jury instructions *de novo*. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996).

CP 49-51 (packet of defense proposed jury instructions). This instruction was consistent with existing Washington law at the time of Mr. Wilson's June 2014 trial and with a Washington pattern jury instruction then pending, and later approved in December of 2014.

In the case of State v. Allen, the Supreme Court had occasion to determine whether a defendant was entitled, as a matter of Due Process, to jury instructions proposed by the defense in a case where the victim asserted a "cross-racial" identification of a perpetrator of a different race than the victim. State v. Allen, 176 Wn. 2d 611, 615 and n. 1, 294 P.3d 679 (2013). The proposed instructions (there were several proffered) stated that the jury "should consider" or "may consider" a widely recognized difficulty of individuals to make cross-racial identifications, in evaluating the testimony of the identifying witness, and also consider whether factors in the case overcome any such difficulty of identification. State v. Allen, 176 Wn. 2d at 615 n. 1.

The Allen Court concluded that there was, in that case, no Due Process violation in the trial court's refusal to give the proposed instruction(s), and the lead opinion determined that the instruction is not constitutionally required in most if not all trial circumstances. State v. Allen, 176 Wn. 2d at 621.

However, the Court, although finding that there was also no abuse of discretion by the trial court in refusing the defense's proposed instructions in the circumstances of the case, made clear that a trial court does have discretion in a given trial to accept or reject an instruction guiding the jury to consider factors pointing to the fallibility of identifications. Allen, 176 Wn. 2d at 615 n. 1.

The Allen Court first noted, in the lead opinion of four justices, that the Court's *prior* decisions had approved of the reasoning of the Courts of Appeal holding that jury instructions on the accuracy or fallibility of "eyewitness identification" *generally*, were likely improper as judicial comments on the evidence and judicial comments on the credibility of a witness. Allen, 176 Wn. 2d at 619-20 (citing State v. Laureano, 101 Wn.2d 745, 682 P.2d 889 (1984); State v. Jordan, 17 Wn. App. 542, 564 P.2d 340 (1977), State v. Edwards, 23 Wn. App. 893, 600 P.2d 566 (1979), and State v. Hall, 40 Wn. App. 162, 697 P.2d 597 (1985)).

And indeed it is true that the Washington Constitution forbids judges from commenting on the evidence. State v. Becker, 132 Wn. 2d 54, 64, 935 P.2d 1321 (1997) (noting that a judge is prohibited by article IV, section 16 from "conveying to the jury his or her personal attitudes toward the merits of the case" or instructing

a jury that "matters of fact have been established as a matter of law").

But crucially, the justices on all sides of the Court's Allen opinion made clear their unified agreement that an instruction advising the jury to be careful in assessing a witness's claimed identification of a perpetrator is not objectionable on ground that it is a comment on the evidence, or a comment on credibility. The lead opinion stated that although the case law did not support such an instruction as being constitutionally required,

> Neither does it support a rigid prohibition against the giving of a cautionary cross-racial identification instruction. Indeed, such a prohibition would be inconsistent with the abuse of discretion standard[.]

Allen, 176 Wn.2d at 624. The concurring Chief Justice and the justices concurring in the result all agreed that the trial court has discretion to give a cross-racial eyewitness identification instruction. Allen, 176 Wn.2d at 624 (concurring opinion of Madsen, C.J.); at 624 (Chambers, J., concurring in result, joined by Fairhurst, J.).[4]

[4] The two dissenting justices stated that in certain circumstances, a jury instruction on cross-racial eyewitness identification should be required as a matter of law. Allen, 176 Wn.2d at 637-43 (dissenting opinion of Wiggins, J., joined by Gonzalez, J.).

Given Allen, a court should consider the precise question of a defense instruction on eyewitness identifications in general, rather than the specific "cross-racial" identification instruction at issue in Allen. The argument in favor of the viability of such an instruction is even stronger. Indeed, the Allen Court itself noted that many jurisdictions that have disapproved of or limited any requirement of instructions on cross-racial identification have done so in reliance on proper jury instructions of the possible fallibility of eyewitness identifications in general. Allen, 176 Wn.2d at 619 (citing Wallace v. State, 306 Ga.App. 118, 701 S.E.2d 554 (2010)).

Further, the consensus, both legal and scientific, in favor of the latter, more general instruction is dramatically stronger than the scientific case for difficulty of cross-racial identification specifically. Allen, 176 Wn. 2d at 616 (recognizing that "[t]he United States Supreme Court focused on eyewitness identification problems in United States v. Wade, 388 U.S. 218, 228, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), noting that the "vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."). Courts have also noted that more wrongful convictions stem from mistaken eyewitness identifications than from all other causes combined. See United

States v. Brownlee, 454 F.3d 131, 142 (3rd Cir. 2006); State v. Riofta, 166 Wn.2d 358, 371, 209 P.3d 467 (2009) (79% of DNA exonerees were falsely convicted based upon eyewitness testimony) (citing Brandon L. Garrett, Judging Innocence, 108 Colum. L. Rev. 55, 60 (2008)).

Finally, there is little if any relationship between the accuracy of an identification, and the high confidence of the witnesses, in particular Ms. Roney, who testified in this case twice that she was one hundred percent certain of her identification. Jules Epstein, The Great Engine that Couldn't: Science, Mistaken Identity, and the Limits of Cross-Examination, 36 Stetson L. Rev. 727, 772 (2007); see Manson v. Braithwaite, 432 U.S. 98, 112, 97 S. Ct. 2243, 53 L.Ed.2d 140 (1977) (recognizing the compelling influence on juries of a confident identification).

Mr. Wilson's proposed defense instruction on eyewitness identifications was in accord with this case law and scientific consensus. It was also in accord with the Washington judiciary's recognition of the difficulty juries have in understanding how to evaluate eyewitness identifications in a balanced manner. Notably, in December of 2014, the Washington State Supreme Court Committee on Jury Instructions adopted the following instruction

predicated specifically on State v. Allen, and made clear that trial courts have discretion to reject -- or accept -- the instruction.

> **WPIC 6.52 Eyewitness Identification Testimony**
>
> Eyewitness testimony has been received in this trial on the subject of the identity of the perpetrator of the crime charged. In determining the weight to be given to eyewitness identification testimony, in addition to the factors already given you for evaluating any witness's testimony, you may consider other factors that bear on the accuracy of the identification. These may include:
>
> • The witness's capacity for observation, recall, and identification;
>
> • The opportunity of the witness to observe the alleged criminal act and the perpetrator of that act;
>
> • The emotional state of the witness at the time of the observation;
>
> • The witness's ability, following the observation, to provide a description of the perpetrator of the act;
>
> • [The witness's familiarity or lack of familiarity with people of the [perceived] race or ethnicity of the perpetrator of the act;]
>
> • The period of time between the alleged criminal act and the witness's identification;
>
> • The extent to which any outside influences or circumstances may have affected the witness's impressions or recollection; and
>
> • Any other factor relevant to this question.

11 Washington Practice Pattern, Jury Instructions, Criminal - WPIC 6.52 (3d Ed) (adopted December 2014).

This instruction had not been adopted at the time of Mr. Wilson's trial; however, Allen had been decided and the Allen Court clearly rejected the bases upon which the trial court below

concluded that the defense proposed instruction was impermissible. See also Allen, 176 Wn.2d at 624 (Chambers, J., concurring in result, joined by Fairhurst, J.) (writing in order to "stress that [the Court has] long rejected the contention that such instructions function as unconstitutional comments on the evidence) (citing State v. Carothers, 84 Wn.2d 256, 267–68, 525 P.2d 731 (1974)).

b. The trial court abused its discretion, requiring reversal. In this case, under *existing* law, the trial court had discretion under the reasoning of Allen to accept or reject the defense proposed instruction. The trial court's categorical rejection of Mr. Wilson's proposed instruction, on ground that it was an improper comment on the evidence, was legal error and therefore an abuse of discretion. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971); see State v. Carothers, supra, 84 Wn.2d at 267–68. Additionally, because the court had discretion under Allen but failed to exercise it, it also abused its discretion. State v. Flieger, 91 Wn.App. 236, 242, 955 P.2d 872 (1998).

The evidence in the case indicated that Ms. Roney claimed to the jury that she was one hundred percent sure of her identification of the defendant in the photomontage, a confidence

that bears no established relationship to accuracy, and perhaps an inverse one. 9/16/14RP at 30-31, 39; see Watkins v. Sowders, 449 U.S. 341, 352, 101 S.Ct. 654, 66 L.ed.2d 549 (1981) (noting that juries do not understand that "the accuracy of an eyewitness and the confidence of that witness may not be related to one another at all.") (Brennan, J., dissenting); see 9/16/14RP at 30-31, 39.

In addition, Ms. Cameron's view of the perpetrators who allegedly entered the door to her home was first through a peephole, and then was made from her vehicle as she briefly conversed with the persons before they fled from her. 9/17/14RP at 116. The requested eyewitness identification instruction was warranted by the evidence, entitling Mr. Wilson to the instruction.

Importantly, although items of property were located at the apartment where Mr. Wilson was one of several people staying, the defense case rested on the argument that the witnesses' identifications were faulty -- because the photomontage and the police officer's presentation of it to Ms. Roney seemed to subtly suggest the defendant's photograph as the perpetrator, and because Ms. Cameron had little adequate time to actually view the people who stepped inside her house. 9/17/14RP at 176-77, 181-82; see 9/16/14RP at 83-85 (defense cross-examination of

Sergeant Renschler). Instructional error requires reversal unless the error is "trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." State v. Golladay, 78 Wn.2d 121, 139, 470 P.2d 191 (1970). Further, a failure to give instructions on a party's theory of the case is prejudicial error if there is evidence to support the theory. State v. Williams, 132 Wn.2d 248, 259–60, 937 P.2d 1052 (1997); State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986).

In this case, Mr. Wilson was entitled to the instruction he proposed, and the error in failing to give it was not trivial, and requires reversal. Mr. Wilson's convictions on counts 1 and 2 should be overturned and a new trial held.

E. CONCLUSION

Based on the foregoing, Nathaniel Forest Wilson requests that this Court reverse his convictions.

Respectfully submitted this 12th day of January, 2015.

Oliver R. Davis WSBA no. 24560
Washington Appellate Project - 91052
Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON, Respondent, v. NATHANIEL WILSON, Appellant.	)	NO. 46771-2-II

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Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Maria A Riley - Email: maria@washapp.org

A copy of this document has been emailed to the following addresses:

tunheij@co.thurston.wa.us